F. M. S. REPORTS.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., WHITLEY & AITKEN, JJ.

November 10, 1936.

CHAIT SINGH.....Plaintiff-Appellant.

v.

TZING TSZE SAM.....Defendant-Respondent.

[PAHANG CIVIL APPEAL No. 3 of 1936.]

The Civil Procedure Code (Cap. 7) section 42 (i) (d) and (e)—Pleadings—Requirements of a plaint—The Limitation Enactment (Cap. 18) Articles 39, 79 and 95.

The plaintiff and the defendant entered into a written agreement on the 5th January, 1930, whereby, after recitals to the effect that the defendant had agreed to purchase a town lot of land and that he was desirous of raising a loan, which would be charged on that lot when it had been transferred into the defendant's name, it was provided that the plaintiff should lend $10,000 to the defendant, and that the plaintiff had already lent $6,000 on promissory notes. It was further provided that the defendant, as soon as the town lot was transferred to him, would execute a charge over it to the plaintiff, and then the plaintiff would pay the balance of $4,000.

The plaintiff claimed that he had paid this balance of $4,000 and that the defendant had neither charged the town lot to him nor repaid any of the moneys lent.

After pleading the written agreement the plaint contained the following allegations:—

(a) That the $4,000 was lent on the defendant's undertaking that it should be included in the charge to be executed pursuant to the agreement.

(b) That the defendant had failed to execute that charge.

(c) That the defendant had failed to repay the $10,000 lent to him under the agreement.

(d) That it was an implied term of the agreement that the defendant should procure the registration of the town lot in his name and/or use his best endeavours to do so.

(e) That the defendant had not procured the registration of the town lot in his name and/or had not used his best endeavours to do so.

(f) In the alternative that the consideration for the loan had failed.

In the demand for relief in the plaint, the plaintiff claimed $10,000 and interest.

At the trial the defendant's Counsel submitted that all that the plaint disclosed was a claim for money lent, which fell within Article 39 of the Limitation Enactment, and so was barred. He further submitted that on the pleadings the defendant was entitled to judgment without calling any evidence. Counsel for the plaintiff contended that the claim was one of breach of contract, which fell within Article 95. He refused to amend the plaint and judgment was given for the defendant.

Held, that the plaint sufficiently complied with the requirements of the Civil Procedure Code (Cap. 7) because it is not obligatory to state in the plaint that the relief is claimed by way of damages, all that is necessary is that the amount shall be stated.

Held further, that the claim was not barred by limitation because the plaint disclosed a claim for compensation for breach of contract, which fell within Article 95 of the Limitation Enactment, or alternatively, a claim for money paid upon an existing consideration which afterwards failed, which fell under Article 79.

The Hon. Mr. E. D. Shearn for the plaintiff-appellant: The plaint sufficiently raises breach of contract and failure of consideration. The real question is the construction of the agreement. The consideration was a promise to give a charge in a reasonable time. This is implied. Alternatively, it is implied that the defendant will use his best endeavours to acquire the land to be charged.

Article 39 of the Limitation Enactment cannot apply because the plaintiff could not have sued for the $6,000 immediately after the agreement was executed. He would have been met with the agreement. The Articles which should be applied are Article 79 or 95.

R. Ramani for the defendant-respondent: The Article applicable depends on the cause of action—*Mitra* on Limitation, p. 1362. This is a claim for money lent and as such is barred. Onus is on plaintiff to show it is not—see section 42 (v) of the Civil Procedure Code and *Lalchand Marwari* v. *Maharit Ramrup Gir*, A.I.R. (1926) P.C. 9, 12.

Alternatives for the first time taken here. Article 95 has no bearing because there is no contract to pay in the agreement.

As to construction of Articles of Limitation see—*Nagendra Nath Dey* v. *Suresh Chandra Dey*, A.I.R. (1932) Privy Council page 165 adopted in *Kwong Yik (Selangor) Banking Corporation* v. *Malayan Daily Express (1926) Ltd.*, (1933-1934) F.M.S.L.R. 51; 2 M.L.J. 198.

In fact the defence says money paid before the agreement. Existing consideration is a promise to charge, which has not failed. The true view of the transaction is that it is a contingent liability—see section 32 of the Contract Enactment (Cap. 52).

The Hon. Mr. E. D. Shearn in reply: The agreement does not impose a contingent liability. The word "if" does not appear in the agreement.

On the question of pleading the plaint complies with section 42 of the Civil Procedure Code. Reference should be made to the forms given to the Second Schedule to the Civil Procedure Code and particularly to No. 1, paragraph 4, No. 2 paragraph 3 and Nos. 57-60. Form No. 112—forms of Concise Statements are only applicable when no plaint is served—see section 50 of the Civil Procedure Code.

Cur. Ad. Vult.

TERRELL, AG. C.J.—At the date of an agreement—that is to say on the 5th January, 1930, the defendant owed the plaintiff a certain sum of money on promissory notes, and was anxious to obtain further advances from the plaintiff. The defendant had also agreed to purchase a piece of land in Johore, but owing to a dispute about the title, his vendor, Syed Hassan, was not in a position to transfer two-thirds of

the land, while litigation was pending on the remaining third.

In those circumstances the agreement was entered into. The recital sets out the difficulties about the land, and then proceeds as follows:—

> "That the second party shall lend a sum of $10,000 bearing interest at 24 per cent. per annum to the first party and on this account the second party has already lent a sum of $6,000 on promissory notes. The first party as soon as the whole land is transferred to his name shall execute a charge over the land to second party. The second party shall on the execution of the charge by the first party pay the balance of $4,000."

The $6,000 was not new money. I take it to be a settlement of former accounts between the parties. When the agreement was signed, the previous promissory notes were surrendered. It will be seen that the remaining $4,000 was only to be advanced when the whole land had been transferred to the defendant and a charge executed, but in fact the $4,000 or the greater part of it was advanced shortly after the agreement was executed, the final advance being on the 27th March, 1930. As the defendant was not in a position to execute the charge, he gave promissory notes and a bill of sale as security for these further advances. The fact, however, that the defendant required and obtained the further advances within three months after the execution of the agreement is some indication that the parties contemplated that the defendant would be in a position to execute the charge within a reasonable time.

The charge, however, was never executed for reasons which have not yet been elucidated. In May 1934 the plaintiff instructed lawyers to write and enquire whether the defendant was not in a position to execute the charge, but no reply appears to have been received, and nothing was done until the plaintiff filed his plaint in this suit on the 31st May, 1935.

The plaint sets out the agreement and in paragraphs 4 to 6 alleges a breach of that agreement or of the terms which must be implied therein. Paragraph 7 makes an alternative allegation that the consideration has failed. The claim itself is applicable to a simple money claim demanding payment of the sum of $10,000 together with interest on $6,000 from the date of agreement and interest on the balance from the dates of the various advances.

The written statement admits the agreement, but alleges that the defendant's only liability is under the express terms of the agreement. The defendant denies that he has not used his best endeavours to get the land transferred into his own name and sets up limitation.

When Mr. Hastings opened the case for the plaintiff, he referred to Article 95 of the Limitation Enactment—this article gives a period of six years when the claim is for compensation for breach of a contract in writing. He also referred to the *Kwong Yik Bank case*, (1933-1934) F.M.S.L.R. 51; 2 M.L.J. 198 where Article 95 was applied. He then proceeded to call his evidence, and closed his case.

On addressing the Court Mr. Ramani, Counsel for the defendant, argued that the claim was a claim on the agreement and that all that the plaintiff could ask for was specific performance or damages for breach. He also argued that neither of these remedies was claimed, that the agreement contained no promise to pay, and that a simple money claim could not be supported on the agreement. He submitted that no cause of action had been disclosed.

Thereupon the learned trial Judge called on Mr. Hastings to reply, expecting him to make an application to amend his pleadings. Mr. Hastings, however, merely repeated that the plaint was a plaint for damages for breach of ontract. The learned trial Judge not accepting this argument, did not call on the defence, but dismissed the claim.

In his grounds of judgment the learned trial Judge decided two things:—

(a) that the suit was not a suit for specific performance or for damages for breach of contract, and

(b) that it was a suit for money payable for money lent and was accordingly barred under Article 39 of the Limitation Enactment.

As regards the latter finding, it will be noticed that it is inconsistent with the argument presented on behalf of the defendant who insisted all along that the claim, if anything, was a claim on the agreement, and that the agreement would not support a simple money claim. In fact, in view of the terms of the agreement it is extremely doubtful whether the plaintiff could have immediately issued a plaint for the money advanced thereon. If that was so, it would appear that Article 39 does not apply at all, or at all events that the period cannot run as suggested by the learned trial Judge from the 27th March, 1930. The plaintiff is certainly not suing on the promissory notes or on the bill of sale. The plaint itself makes it obvious that if he is suing on anything, he is suing on the agreement.

The issue between the parties on the appeal accordingly resolves itself into a matter of pleading. It was, I think, conceded by the appellant's counsel that the plaint was not a

satisfactory document, and that if it was intended to sue for damages for breach of contract, it was unfortunate that the plaint did not say so in so many words. It has to be remembered, however, that the rules of pleading in the Federated Malay States are extremely vague. Section 42 of the Civil Procedure Code is the only section which deals with the matter, and this section merely requires the facts to be set out. The forms of plaint given in the schedule nowhere appear to require that the exact cause of action should be alleged. Certainly it is usual for practitioners in the Supreme Court to allege their cause of action with particularity, and it is certainly desirable that they should do so, and generally speaking, the more exact rules of pleading obtaining in the Colony are followed, but strictly speaking the plaint appears to be in accordance with the present very inadequate provisions of the Federated Malay States Civil Procedure Code. Apart from that, plaintiff's counsel made it quite clear in his opening what his cause of action was alleged to be. If defendant had been taken by surprise, he could have immediately objected, and if necessary, obtained an adjournment.

As a result, however, of the defendant submitting that he had no case to answer, and of the learned Judge's ruling in his favour, the issues arising from the allegation of breach of contract have never been properly litigated, and no finding has been made thereon.

I would, accordingly, allow the appeal and set aside the order made, and remit the case for re-hearing by the Supreme Court. The appellant will be entitled to his costs of the appeal. The costs of the hearing before Mr. Justice Pedlow must abide the result of the retrial. The deposit should be paid out to the appellant or his solicitor.

WHITLEY, J.—This appeal turns entirely on a question of pleading. Paragraph 2 of the plaint sets out an agreement dated the 5th January, 1930, made between the plaintiff and the defendant, which was obviously drawn up by the parties themselves and, like many such agreements, is open to various constructions. It recites that the defendant was desirous of raising a loan by charging certain lands which had not yet been transferred into his name, and proceeds as follows:—

> "It is hereby agreed that the second party shall lend a sum of $10,000 bearing interest at 24 per cent per annum to the first party and on this account the second party has already lent a sum of $6,000 on pronotes. The first party as soon as the whole land is transferred to his name shall execute a charge over the land to second party. The second party shall on the execution of the charge by the first party pay the balance of $4,000."

By paragraph 4 it is alleged that the defendant has failed to charge the land or to procure that it should be registered in his name, and that he has not repaid the $10,000 to the plaintiff.

By paragraph 5 it is alleged that it was an implied term of the said agreement that the defendant should procure the registration of the said land in his own name and/or use his best endeavours to procure the said registration.

By paragraph 6 it is alleged that the defendant has not used his best endeavours to procure the registration, and in paragraph 7 it is pleaded in the alternative that the consideration for the loan has failed.

The plaint concludes:—"The plaintiff claims under paragraphs 2 to 7 hereof $10,000 and interest."

At the close of the plaintiff's case Mr. Ramani who appeared for the defendant submitted that all that the plaint disclosed was a claim for money lent, which fell within Article 39 of the Limitation Enactment, and was clearly barred, and that the defendant was entitled to judgment on the pleadings without calling any evidence. The learned trial Judge agreed with that submission but gave Mr. Hastings, who appeared for the plaintiff, an opportunity of amending his plaint if he so desired. Mr. Hastings contended that the claim was for breach of contract which fell within Article 95, and accordingly was not barred. He refused to amend, and judgment was given for the defendant.

As the case was presented in the Court below, it is not surprising that the learned trial Judge took that view. The plaint is loosely drawn, and anyone reading it as it stands might be excused for treating it as a claim for money lent. There is not a word about breach of contract or damages. and the concluding words which specify the nature of the claim are in precisely the same form as is ordinarily used in claims for money due on promissory notes. I cannot conceive that a statement of claim so drawn would be accepted in the English Courts as sufficient without amendment to support a claim for breach of contract, and it is difficult to understand why advantage was not taken of the very reasonable suggestion that the appropriate amendment should be made so as to make the plaint conform with the ordinary requisites of pleading.

At the hearing of the appeal we had the advantage of listening to an able and closely reasoned argument by Mr. Shearn which satisfied me that, when analysed, the plaint

sufficiently complies with the somewhat sketchy requirements of the Civil Procedure Code. All that is required by section 42 (i) (d) and (e) is a plain and concise statement of the circumstances constituting the cause of action and where and when it arose, followed by a demand for the relief which the plaintiff claims.

From the forms of plaints given in the Second Schedule to the Code, it would appear that it is not obligatory to state in the demand that the relief claimed is by way of damages. All that is necessary is that the amount should be stated. Mr. Shearn argued that the plaint sufficiently complies with the requirements of the Code in alleging facts which, if proved, may establish a claim either for compensation for breach of a contract in writing, which would fall within Article 95 of the Limitation Enactment, or alternatively, a claim for money paid upon an existing consideration which afterwards failed, which would fall within article 79. I think that contention is sound, and as neither of those articles would bar the claim, there was a *prima facie* case for the defendant to meet, and the defence should have been called upon.

Mr. Ramani also took the point that there was no case for the defendant to meet inasmuch as the claim. if in fact one for breach of contract, was founded upon a contingent contract falling within section 31 of the Contract Enactment. The contingency, he argued, was that the land should become registered in the defendant's name, which contingency had never happened. The flaw in that argument seems to be that the words used in the agreement are 'as soon as' and not 'if,' a difference which distinguishes the case from the illustrations given under section 31.

The agreement being, as it seems to me, capable of *inter alia* the construction which the plaintiff seeks to put upon it, the case must obviously go back for retrial. I can see no reason why it should not be retried by the same Judge, in which case the evidence already recorded would stand, and the hearing be resumed at the point where it left off.

In conclusion I should perhaps refer to another aspect of the case which was touched upon by Mr. Shearn, as, without attempting in any way to prejudge questions of limitation which can only be finally determined after both sides have been heard, I feel that it may be useful to have his submission on record at this stage. He advanced the following ground for holding that in any event the plaintiff's claim cannot fall within article 39, namely that that article could only apply if, on the true construction of the agreement, the plaintiff was entitled to demand the return of the money at any time after the agreement was made. He argued that if the plaintiff had demanded the return of the money, let us say a week after the making of the agreement, the defendant would have immediately met him with the answer that a reasonable time must be allowed under the terms of the agreement for the defendant to put himself in a position to give the charge. This submission seems to me to merit careful consideration.

I would allow the appeal with costs remitting the case for rehearing the costs below, both of the trial and the re-trial, to abide the result of the retrial.

AITKEN, J.—The plaintiff and defendant entered into a written agreement at Kuala Lipis on the 5th of January, 1930, whereby, after recitals to the effect that the defendant had agreed to purchase a town lot at Kuala Lipis from a certain Syed Hassan and that he was desirous of raising a loan which would be charged on that lot when it had been transferred into the defendant's name, it was provided as follows:— that the plaintiff should lend a sum of $10,000 bearing interest at 24 per cent. per annum to the defendant, and on that account the plaintiff had already lent a sum of $6,000 on promissory notes. The defendant, as soon as the whole town lot was transferred to his name, would execute a charge over the land to the plaintiff, and the plaintiff would on the execution of that charge pay the balance of $4,000. According to the plaintiff he paid this balance of $4,000 and an additional $100 to the defendant without waiting for the transfer of the land to the defendant and the execution of the promised charge. Years passed by, and the defendant neither fulfilled his promise as to the charge nor repaid any of the moneys so alleged to have been paid to him. The plaintiff became dissatisfied with the position, and on the 31st of May, 1935, the plaint in this suit was filed.

In that plaint, after pleading the written agreement I have already mentioned and payment of the $4,000 before the same became payable, the following allegations appear:—

(a) That the $4,000 was lent on the defendant's undertaking that it should be included in the charge to be executed pursuant to the agreement.

(b) That the defendant had failed to execute that charge.

(c) That the defendant had failed to repay the $10,000 lent to him under the agreement.

(d) That it was an implied term of the agreement that the defendant should procure the registration of the town lot in his name and/or use his best endeavours to do so.

(e) That the defendant had not procured the registration of the town lot in his name and/or had not used his best endeavours to do so.

(f) In the alternative that the consideration for the loan had failed.

Then, on these facts, the plaintiff claims:—

(i)	The sum of $10,000.00.	
(ii)	Interest on $6,000/– from 5-1-1930 to 28-5-1935 at 24 per cent per annum -	$7,769.03
(iii)	Interest on $300/– from 2-1-1930 to 28-5-1935 at 24 per cent per annum -	389.03
(iv)	Interest on $800/– from 8-1-1930 to 28-5-1935 at 24 per cent per annum -	$1,034.32
(v)	Interest on $2,000/– from 17-1-1930 to 28-5-1935 at 24 per cent per annum -	$2,574.19
(vi)	Interest on $1,000/– from 27-3-1930 to 28-5-1935 at 24 per cent per annum -	$1,240.65
(vii)	Interest on the aggregate sum at 8 per cent per annum from date of judgment to date of payment.	
(viii)	Costs.	

In his statement of defence the defendant, after admitting the agreement of the 5th of January, 1930, proceeded to deny:—

(a) That any sum or sums of money were paid to him in pursuance of the agreement or subsequent thereto.

(b) That he gave any undertaking as alleged or at all.

(c) That he was under any implied obligation to the plaintiff on the footing of the agreement.

(d) That he had not used his best endeavours to procure the registration of the town lot in his own name.

He then contended (1) that such sums as were advanced to him by the plaintiff had been advanced to him before the date of the agreement and independently of it; and (2) that the plaintiff's claim is barred by the Limitation Enactment.

When this suit came on for trial before Pedlow, J. on the 29th April, 1936, Mr. Hastings appeared for the plaintiff and Messrs Ramani and Sen for the defendant. The learned Judge's notes of Mr. Hastings' opening read—

"Hastings:—

Reads plaint and defence.

Kwong Yik Bank case (1933-1934) F.M. S.L.R. 51.

Written contract under article 95."

After Mr. Hastings' opening the plaintiff himself gave evidence in support of his claim. He produced the original agreement of the 5th of January, 1930, which was put in evidence. He stated that when the agreement was signed he handed the defendant back promissory notes to the face value of $6,000, which the defendant had given him for money lent in or about the year 1929. According to him he advanced the defendant $300 on the 2nd of January 1930, just before the agreement was executed, and made further advances to him after its execution as follows:—

On 8th of January 1930 - $ 800
On 17th of January 1930 - $2,000
On 27th of March 1930 - $1,000

For the first of these two payments he produced promissory notes of even date, and for the last payment of $1,000 a bill of sale also of even date. The rest of the plaintiff's evidence in chief need not be set out in detail; it is sufficient to state that it bore out the allegations contained in the plaint. It is also unnecessary for me to say more about Mr. Ramani's cross-examination of the plaintiff than this: that it was apparently directed to showing that in point of fact he made no advances to the defendant after the date of the agreement, and was otherwise an unreliable witness. Apart from the plaintiff himself Mr. Hastings called no other witness.

Mr. Ramani then submitted that the only relief demanded by the plaintiff in his plaint is a plain and simple judgment for money lent. And as the agreement itself contained no promise on the part of the defendant to repay any part of the money which is alleged to have been lent, therefore Article 39 in the Schedule to the Limitation Enactment applies and the plaintiff's claim is statute barred.

To this argument Mr. Hastings replied that the plaint included a claim for damages for breach of contract to which Article 95 in the same Schedule applies; and that the suit had been commenced within the six year period allowed by that article. He refused a suggestion by the learned Judge that he should apply to amend the prayer to his plaint by adding an alternative claim for damages for breach of the agreement of the 5th of January, 1930.

What happened next is best set forth in the learned Judge's own words:—

"I do not call on the defence for any evidence but give judgment on the pleadings as follows:—

The agreement attached to the plaint contains no promise to pay by the defendant. This suit is not a suit for specific performance nor, in my view, a suit for damages for breach of contract. If it were the latter it would fail on the

evidence adduced as the defendant was to execute the charge to the plaintiff as soon as the whole land was transferred to the defendant's name. There was no evidence that that position had yet arisen or that defendant had failed to do what he could to make possible the execution by him of a charge over the land.

I regard this suit as a claim for money payable for money lent. The defendant in his statement of defence raises and relies on a plea of limitation. I make no comment on the morality of his doing so, but he is perfectly entitled at law to raise this defence if he so chooses. The period of limitation which applies is, in my view, three years under article 39 of the Limitation Enactment. The last sum lent was on the 27th March, 1930. No interest has been paid and no repayment of capital has been made since and there has been no subsequent acknowledgment of the debt. The plaint was filed on 31.5.35. The defence of limitation must, therefore, succeed and I accordingly dismiss this suit with costs against the plaintiff."

Now if our *corpus juris* contained any provisions in relation to plaints in the Supreme Court similar to those of Order 20 rule 6 of the Rules of the Supreme Court in England, I should be strongly averse to interfering with the learned Judge's judgment. Order 20 rule 6 of the Rules of the Supreme Court of England, so far as material to our purposes, reads thus:—"Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative," and it is noteworthy that the 1908 Indian Code of Civil Procedure contains precisely the same provision in its Order 7 rule 7. Our Civil Procedure Code, however, is still based on the old Indian Code of Civil Procedure of 1882, and the only direct provision as to relief which a plaintiff claims is that set out in section 42 (i) (e), to wit, "The plaint shall..... contain.....a demand of the relief the plaintiff claims." Section 50 (e) of the Indian Code of 1882 is word for word the same except that instead of "shall contain" the Indian section employs the phrase "must contain:" the meaning in each case being obviously identical. If we compare the English Order 20 rule 6 and the modern Indian Order 7 rule 7 on the one hand with our section 42 (i) (e) and the former Indian section 50 (e) on the other hand, it is clear that whereas the former contemplate and enforce a precise and definite statement of all the relief that is claimed by a plaintiff, the latter contemplate and permit a vague and indefinite statement of the same. As showing how leniently and indulgently the Indian Courts treated careless or faulty demands for relief under the 1882 Code, the following passage from the judgment of *Nudiar Chand Shaha* v. *Pran-nath Shaha*, (1874) 21 W.R. 8 is cited with approval at page 188 of the 5th edition of *O'Kinealy's* Code of Civil Procedure:—

"It has been said by the pleader for the respondent that the plaintiff, having framed his suit for a remedy in a particular form, ought to be restricted to that remedy. Speaking for myself, I think it a good rule to hold a plaintiff strictly to his plaint; but a plaintiff is entitled to ask the Court to give him any remedy which the Court may think proper upon the state of facts disclosed by him in his plaint, and established by the evidence; and, although he may have been mistaken in asking for a particular remedy, that will not debar him from obtaining some other remedy similar in its nature, and not more extensive than what was originally sought, provided it requires no change in the facts as originally alleged. In this suit the facts remain unchanged, though the legal effect of those facts is not what the plaintiff attributed to them."

If our Civil Procedure Code applied to the Supreme Court only, I am by no means sure that I should be prepared to accept this passage as a correct statement of the law; common fairness requires that a defendant should know before he comes into Court what case he has to meet, and the "forms of concise statements" which are contained in the Schedule to our Civil Procedure Code at least indicate that where damages are being claimed for breach of agreement a specific claim to that effect should be made. But our Civil Procedure Code applies to Magistrate's Courts as well as to the Supreme Court, and it cannot have been intended to enforce any strict rules in regard to the formulation of the relief sought by a plaintiff in the latter. It must also have been the intention of the legislature that section 42 (i) (e) of our Civil Procedure Code should be construed in the same way in all Courts, and that seems to me to conclude the matter. If a Court in the Federated Malay States can discover any remedy to which a plaintiff may be entitled on the state of facts disclosed in his plaint and established by the evidence, then the Court must grant him relief in that respect however vague, unsatisfactory or even mistaken his demand for relief may be; provided that such relief does not exceed in value or amount the relief originally claimed.

Turning back to the 'demand for relief' in this case, I agree that it indicates a claim for

money lent with interest thereon: certainly in itself it contains no hint that the plaintiff is suing for damages for breach of agreement. But it does claim a considerable sum of money—rather more than $23,000 in all, and money is always awarded by way of damages. The body of the plaint also discloses a state of facts which, if established by the evidence, amounts to a breach of agreement on the part of the defendant. As to whether those facts have been, or will be established by the evidence I cannot say, since I do not know to what extent the learned Judge accepted the plaintiff's evidence. I will point out, however, that section 106 of the Evidence Enactment provides that "when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." It may well be that the burden of proving that he used his best endeavours to procure the registration of the town lot in question in his own name rests on the defendant.

For these reasons which I have given I think that the learned Judge was wrong in giving "judgment on pleadings," and that this case must be remitted to the Court below to be tried on its merits. I also agree with the order as to costs, proposed by the learned President.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J., WHITLEY & PEDLOW, JJ.

November 20, 1936.

VALLIPURAM SIVAGURU.....Plaintiff-Appellant.

v.

P. C. R. M. PALANIAPPA CHETTY OFFICIAL ADMINISTRATOR AS ADMINISTRATOR OF THE ESTATE OF GAN INN, DECEASED .....Defendants-Respondents.

[NEGRI SEMBILAN CIVIL APPEAL No. 2 of 1936.]

The Land Code (Cap. 138), sections 85, 134 and 155—Unregistered transfer—Lien—Prior equities.

In 1931 G. deposited his issue document of title to land with the first defendant-respondent as security for a loan and in 1932 sold the same land to N explaining the absence of the issue document of title by a false statement that it was lost. On account of the absence of the issue document of title N could not obtain registration of the transfer on sale and in consequence lodged a caveat against the land under section 165 of the Land Code. G died in 1932, shortly after executing the transfer in favour of N, and in 1933 the first defendant-respondent lodged a caveat under section 134 of the Land Code claiming a lien by deposit with him of the issue document of title. At the end of 1933, N executed a transfer of this land in favour of the plaintiff-appellant and N died in June, 1934. In August, 1934, this land was transmitted to the second defendant-respondent as administrator of G's estate.

Held, that the first defendant-respondent had acquired, by the deposit with him of the issue document of title, the right to a lien over the land by registering at any time a caveat under section 134 of the Land Code (Cap. 138). That as between the first defendant-respondent and the plaintiff-appellant the former had the prior equity and that his delay in presenting his caveat for registration was not an omission which operated and enured to forfeit and take away his pre-existing equitable title.

Held further, that N could not have obtained a decree for specific performance against G so long as the issue document of title remained deposited with the first defendant-respondent and therefore the plaintiff-appellant could not obtain a decree directing the second defendant-respondent to transfer the land to him unencumbered by the lien.

Decision of Aitken, J. in *Vallipuram Sivaguru* v. *Palaniappa Chetty* (1936) F.M.S.L.R. 109; 5 M.L.J. 199 affirmed.

E. Jeff for plaintiff-appellant.

A. J. Bostock-Hill for the first defendant-respondent.

Second defendant-respondent absent.

Cur. Ad. Vult.

TERRELL, AG. C.J.—In this case I find myself so entirely in agreement with the decision of the learned trial Judge and with the reasons which he has given that there is very little which I wish to add. There are, however, one or two points which were argued in the Court of Appeal, but which, if raised, were not stressed in the Court below. They are accordingly not referred to in the grounds of judgment.

For the sake of clarity I will recapitulate from the written judgment the principal dates as therein set out.

January 19th, 1931.	Gan Inn executes the promissory note in favour of the first defendant, and deposits the issue document of title to Lot No. 297 in the Mukim of Ayer Kuning with the first defendant as security for repayment of loan and interest.
March 17th, 1932.	Gan Inn sells and purports to transfer Lot No. 297 to Nagappa Eliathamby.
March 21st, 1932.	Nagappa Eliathamby lodges a caveat which is registered on the same day.
April 6th, 1932.	Gan Inn dies.
August 22nd, 1933.	Palaniappa Chettiar, the first defendant, lodges a caveat which is registered the same day.
Dec. 8th, 1933.	Nagappa Eliathamby sells and purports to transfer Lot No. 297 to Sivaguru Vallipuram the plaintiff.
June 15th, 1934.	Nagappa Eliathamby dies, and no personal representative of his estate has yet been appointed.